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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/723,554
Filing Date: November 26, 2003
Appellant(s): GAUDIANA ET AL.

Sean P. Daley
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12/17/2009 appealing from the Office action mailed 4/6/2009.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct.

Ground 1: Claims 1-12, 14-18, 23-42, 53-62, 64-69 and 81-82 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al. (US Patent 5331183). The subject matter relied upon below is supported by Scher et al's provisional application 60/421353 filed on 10/25/2002, and thus has a 102(e) date with respect to the instant claims.

Ground 2: Claims 43-52 and 70-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Saricifci et al. (5331183), and further in view of Chapin et al. (US Patent 2780765).

Ground 3: Claims 63 is rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (6878871) in view of Saricifci et al. (5331183) and further in view of Griffin (US Patent 3442007).

Note that Appellant has not presented a terminal disclaimer in response to the proposed obviousness-type double patenting of claims 1-12, 14-18, 23-74 and 81-82 over application no. 11/033217 (which is now US Patent 7586035). Thus, for this appeal, the Examiner has maintained this rejection.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6878871	Scher et al.	04-2005
5331183	Saricifci et al.	06-1994
3442007	Griffin et al.	05-1969

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1-12, 14-18, 23-42, 53-62, 64-69 and 81-82 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al. (US Patent 5331183). The subject matter relied upon below is supported by Scher et al's provisional application 60/421353 filed on 10/25/2002, and thus has a 102(e) date with respect to the instant claims.

Regarding claims 1 and 81, as seen in Figure 7, Scher et al. discloses a photovoltaic cell comprising a first electrode (704); a mesh electrode (706); and a photoactive layer (702) between the electrodes, wherein the photoactive layer (702 which is similar to photoactive layer 102 as seen in Figures 1 and 4A) comprises an electron acceptor such as nanocrystals (104) and an electron donor material (106) such as conductive polymer P3HT. (See col. 14 lines 48-67; col. 32 lines 27-57; and col. 17 line 25-38).

Scher et al. does not specifically teach using fullerene as an electron accepting material.

Sariciftci et al. teaches a photoactive layer of a solar cell (or photovoltaic cell – See abstract) having fullerene as the electron acceptor and polymer as an electron donor. (See col. 3 line 7 through col. 6 line 17)

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the photovoltaic cell of Scher et al. by using fullerene as taught by Sariciftci et al. in place of the nanocrystals for the electron acceptor material, because Sariciftci et al. teaches using fullerene would have advantages in cost reduction, simplifying the fabrication procedures and enabling a continuous manufacturing process and fabricating of large area solar cells (See col. 1 line 15 through col. 4 line 6). In regarding the limitation "printed mesh" in claim 81, it is the Examiner's position that Scher et al's wire mesh or screen mesh reads on the instant "printed mesh" because the "printed mesh" does not impart a distinguishable and patentable limitation that further gives a distinctive structural characteristic to the final

product of the solar cell as to whether the mesh is produced by printing or not. Scher et al's wire mesh or screen mesh and instant "printed mesh" are mesh electrodes having equivalent function in the solar cell. In addition, the "printed mesh" appears to be a product by process limitation that does not further define the structure of the mesh electrode and thus is not given weight in the apparatus claim. The determination of patentability of a product is based on the product itself, not on its method of production. If the product in the product-by-process is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). MPEP 2113.

Regarding claims 2-4, 6-7 and 25, Scher et al. describes both electrodes (first and second electrodes, or anode and cathode) can be wire arrays, interspersed with complementary wires. (See col. 31 lines 20-36). Therefore, it is the Examiner's position that Scher et al. teaches both anode and cathode are mesh electrodes comprising wires and electrically conductive material.

Regarding claims 5 and 8, Scher et al. teaches the electrodes can be made of metal. (See col. 30 line 63 to col. 31 line 4; col. 32 lines 45-49).

Regarding claims 9-10, Scher et al. teaches the wire electrodes can be coated with blocking layers (See col. 31 lines 20-36). Scher et al. also teaches a material for electron blocking layer is polymer P3HT (See col. 22 lines 30-43). Therefore it is the Examiner's position that Scher et al. teaches the wire electrodes comprises coating including electrically conductive material such as polymer.

Regarding claims 11-12, Scher et al. teaches the electrodes are overlapping arrays of wires or interspersed with complementary wires (See col. 31 lines 20-36). Therefore it is the Examiner's position that Scher et al. teaches woven mesh electrodes as claimed in claim 12. It is also the Examiner's position that Scher et al's wire mesh electrode reads on the instant "expanded mesh" in claim 11 because the "expanded" does not impart a distinguishable and patentable physical limitation. For example, the metal material, the thickness, the opening size of the mesh, etc., of the instant expanded mesh electrode can be the same as in Scher et al. regardless of whether or not Scher et al's wire mesh electrode has been subjected to a product-by-process expanding step. In other words, any wire metallic mesh electrode is essentially the same as the instant expanded mesh electrode in the absence of a recitation of a distinguishing feature.

Regarding claim 14, Sariciftci et al. teaches using substituted fullerenes (See claim 1)

Regarding claims 15-16, both Scher et al. teaches using electron donor polymer comprising poly(3-hexylthiophene). (col. 17 lines 26-38 of Scher et al.).

Regarding claims 17-18, Scher et al. teaches including a hole blocking layer between the photoactive layer and an electrode (or the first electrode - See col. 27 lines 41-49). The hole blocking layer comprises a metal oxide such as TiO_2 (See col. 22 lines 1-43).

Regarding claims 23-24, as seen in Figure 4A, Scher et al. teaches including a hole carrier layer (or electron blocking layer 410) between the photoactive layer (102)

and an electrode (110), wherein the hole carrier layer comprises polythiophenes (See col. 22 lines 1-43). Scher et al. also teaches either electrodes can be mesh electrode. (See col. 31 lines 20-36). Therefore it is the Examiner's position that Scher et al. teaches that the hole carrier layer is between the first electrode and the photoactive layer since the position of the hole blocking and hole carrier depends on the position of the electron acceptor and electron donor in the photoactive layer.

Regarding claims 26-27, 32-33, 39, 53-54, 59-60 and 66, as seen in Figure 4A, Scher et al. discloses a photovoltaic cell comprising a first electrode (108); a second electrode (110); and a photoactive layer (102) between the electrodes, wherein the active layer (102 as seen in Figure 1) comprises an electron acceptor such as nanocrystals (104) and an electron donor material (106) such as conductive polymer P3HT; a hole blocking layer (420) between the first electrode (108) and the photoactive layer (102); a hole carrier (or electron blocking layer 410) between second electrode (110) and the photoactive layer (102). (See col. 14 lines 48-67; col. 22 line 1 to col. 23 line 7; and col. 17 line 25-38). Scher et al. also teaches that both electrodes can be formed by overlapping arrays of wires (See col. 31 lines 20-36), or wire mesh. Therefore it is the Examiner's position that the first and second electrodes can be wire mesh electrodes, the first mesh electrode (second electrode 110) is in contact with the hole carrier, and the second mesh electrode (first electrode 108) is in contact with the hole blocking layer.

Scher et al. does not specifically teach using fullerene as an electron accepting material.

Sariciftci et al. teaches a photoactive layer of a solar cell (or photovoltaic cell – See abstract) having fullerene as the electron acceptor and polymer as an electron donor. (See col. 3 line 7 through col. 6 line 17)

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the photovoltaic cell of Scher et al. by using fullerene as taught by Sariciftci et al. in place of the nanocrystals for the electron acceptor material, because Sariciftci et al. teaches using fullerene would have advantages in cost reduction, simplifying the fabrication procedures and enabling a continuous manufacturing process and fabricating of large area solar cells (See col. 1 line 15 through col. 4 line 6).

Regarding claims 28, 34, 55 and 61, Scher et al. teaches the electrodes can be made of metal. (See col. 30 line 63-col. 31 line 4; col. 32 lines 45-49.

Regarding claims 29-31 and 56-58, Scher et al. teaches the hole carrier (or electron blocking layer) comprising polythiophenes, and hole blocking layer comprising TiO_2 (or metal oxide). (See col. 22 lines 1-43).

Regarding claims 35-36 and 62, Scher et al. teaches the wire electrodes can be coated with blocking layers, electron blocking (or hole carrier) and hole blocking layer. (See col. 31 lines 20-36). Scher et al. also teaches a material for electron blocking (or hole carrier) layer is polymer P3HT (See col. 22 lines 30-43). Therefore it is the Examiner's position that Scher et al. teaches the wire mesh electrodes comprise coating

including electrically conductive material, wherein the wire mesh electrode in contact with the hole carrier is coated with hole carrier material such as polymer.

Regarding claims 37-38 and 64-65, Scher et al. teaches the electrodes are overlapping arrays of wires or interspersed with complementary wires (See col. 31 lines 20-36). Therefore it is the Examiner's position that Scher et al. teaches woven mesh electrodes in claims 38 and 65. It is also the Examiner's position that Scher et al's wire mesh electrode reads on the instant "expanded mesh" in claims 37 and 64 because the "expanded" does not impart a patentable and distinguishable physical limitation. For example, the metal material, the thickness, the opening size of the mesh, etc., of the instant expanded mesh electrode can be the same as in Scher et al. regardless of whether or not Scher et al's wire mesh electrode has been subjected to a product-by-process expanding step. In other words, any wire metallic mesh electrode is essentially the same as the instant expanded mesh electrode in the absence of a recitation of a distinguishing feature.

Regarding claims 40 and 67, as seen in Figure 7, Scher et al. teaches a substrate (710) supporting the mesh electrode (706).

Regarding claims 41 and 68, Scher et al. describe depositing PEDOT-PSS onto the substrate before depositing nanocyrstal blend solution with one ingredient is a hole carrier material. (See Examples 1 and 2). Therefore, it is the position of the Examiner's that PEDOT:PSS is an adhesive material and being deposited between the substrate and the hole carrier.

Regarding claims 42 and 69, as seen in Figure 7, Scher et al. describes the photoactive layer (702) is in contact with the substrate (710) through openings (708). In addition, the photoactive layer comprises hole carrier (See col. 17 lines 39-50). Scher et al. also teaches the wire mesh electrode can be coated with hole carrier material. Therefore it is the Examiner's position that the hole carrier is in contact with the substrate supporting the mesh electrode on the hole carrier side through openings of the mesh electrode.

Regarding claim 82, Scher et al. teaches a thickness of a metal electrode is approximately 200 nm (See col. 43 lines 5-10). Therefore it would have been obvious to one skilled in the art that the mesh electrode of Scher et al. can have a thickness of 200 nm, or in the range of a maximum thickness of at most about 10 microns.

5. Claims 43-52 and 70-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al. (US Patent 5331183) and further in view of Chapin et al. (US Patent 2780765).

Scher et al. and Sariciftci et al. teach a photovoltaic cell as applied to claims 1-12, 14-18, 23-42, 53-62, 64-69 and 81-82 above, wherein Scher et al. describes the output of the cell connected to a load (See Figure 1 of Scher et al.).

Neither Scher et al or Sariciftci et al. specifically teaches electrically connecting the cells in series or in parallel.

Chapin et al. teach connecting the photovoltaic cells in series and parallel. (See col. 4 lines 45-74).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to connect the photovoltaic cells of Scher et al. and Sariciftci et al. in either series or parallel as taught by Chapin et al, because Chapin et al. teaches connecting photovoltaic cells in series or in parallel would give a large voltage or a large current, respectively, according to the desired output. (See col. 4 lines 48-50 of Chapin et al.).

6. Claims 63 is rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al.(US Patent 5331183), and further in view of Griffin (US Patent 3442007).

Scher et al. and Sariciftci et al. teach a photovoltaic cell as applied to claims 1-12, 14-18, 23-42, 53-62, 64-69 and 81-82 above

Scher et al. in view of Sariciftci et al. does not teach coating wire mesh electrode in contact with the hole blocking with metals, alloys, polymers and combinations thereof.

Griffin et al. teach coating a wire mesh with electrically conductive material such as gold, copper or nickel. (See col. 2 lines 63-72).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the photovoltaic cell of Scher et al. in view of Sariciftci et al. by coating the wire mesh with metal as taught by Griffin et al. before optionally coating with hole blocking material, because Griffin et al. teach coating the wire with metals such as gold, copper or nickel would provide an effective adhesion and good power efficiency. (See col. 2 lines 62 to col. 3 line 4 of Griffin et al.)

Double Patenting

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claims 1-12 and 14- 18, 23-74 and 81-82 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-39 of Application No. 11/033217 in view of Scher et al. (US Patent 6878871). The subject matters of the claims of copending Application No. 11/033217 are substantially the same as that of the instant claims, except for the manner in which the electrodes are in the shape of a mesh, a hole blocking layer, a hole carrier layer. It would have been obvious to one having ordinary skill in the art to modify the cell of claims 1-39 of copending Application No. 11/033217 by utilizing the materials as taught

Scher et al., because it would provide a desired overall device property. (See col. 4 lines 56-58).

This is a provisional obviousness-type double patenting rejection.

(10) Response to Argument

Ground 1: Claims 1-12, 14-18, 23-42, 53-62, 64-69 and 81-82 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al. (US Patent 5331183).

Appellant argues that the light absorption of nanocrystal was an important part of the light to electricity conversion mechanism in Scher, and one skilled in the art would not modify Scher's system by replacing the purportedly light-absorbing nanocrystal with a material that was not known to have comparable light absorbing properties. Appellant also argues that Sariciftci discloses a composition that can include a polymer and a fullerene, in which light is absorbed by the polymer. Appellant argues that Sariciftci does not appear to indicate that fullerene absorbs light; therefore one skilled in the art would not replace Scher's nanocrystal with Saricifci's fullerene.

However, the Examiner respectfully disagrees. Both Scher and Sariciftci teach a functional photovoltaic device (see the titles of both Scher and Sariciftci) with a functional photoactive layer disposed between two electrodes (e.g. photoactive layer 102 disposed between two electrodes 108 and 110 as seen in Figures 1 and 4A-4B, also see col. 14 lines 48-68 of Scher; photoactive layer of heterojunction of fullerene and conductive polymer between two conducting electrodes as seen in col. 5 line 39 through col. 6 line 17 and examples 5-8), wherein the photoactive layer must have a

junction, more specifically pn junction (e.g. electron donor and electron acceptor junction, or hole conducting and electron conducting junction) in order to separate the electron from the hole upon light impinging, thereby converting light to electricity (see the general concept of photovoltaic device as in type II of Figure 2, where the holes and electrons must be separated and conducted in opposite directions, col. 15 lines 1-64 of Scher; col. 1 lines 15-37 and col. 2 lines 18-29 of Sariciftci). The photoactive layer of a photovoltaic device must absorb light and separate electron from hole to generate electricity, regardless where in the photoactive layer light is absorbed. While Scher emphasizes on using the nanocrystals as the electron acceptor, Scher also teaches using nanostructures in general (See col. 14 lines 21-22 of Scher) and not limiting to nanocrystals (see col. 12 line 36 through col. 13 line 13) . It is noted that nanocrystals are nanostructures, but not all nanostructures are nanocrystals. Scher discloses a functional photoactive layer comprising electron acceptor (104 in Figure 1) such as nanocrystals and electron donor (106 in Figure 2) such as conducting polymer P3HT (or poly-3-alkylthiophene), MEH-PPV, PPV, polyaniline etc... (See figures 1, 4A-4B, col. 14 lines 48-68, col. 22 lines 44-66, col. 17 lines 26-38). Sariciftci discloses a functional photoactive layer comprising an electron acceptor (n-type) such as fullerene (see col. 2 lines 18-29, col. 3 lines 8-58) and electron donor (p-type) such as poly-3-alkylthiophene (see Fig. 1K of Sariciftci), MEH-PPV (see col. 4 lines 44-55, and all examples in Sariciftci), PPV (see Fig. 1F of Sariciftci), polyaniline (see Fig. 1N of Sariciftci).

In summary:

Functional photoactive layer in a function photovoltaic device

	Electron acceptor (n-type)	Electron donor (p-type)
Scher	Nanostructure (e.g. nanocrystals)	P3HT (e.g. a poly 3-alkylthiophene), MEH-PPV, PPV, polyaniline
Sariciftci	Fullerene	Poly 3-alkylthiophene, MEH-PPV, PPV, polyaniline

As seen in the comparison table above, both Scher and Sariciftci teach functional photoactive layers in functional photoactive devices using the same material for the electron donor. While the reference to Scher uses nanocrystals as the electron acceptor, the reference to Sariciftci uses fullerene as the electron acceptor for the purpose of having advantages in cost reduction, simplifying the fabrication procedures and enabling a continuous manufacturing process and fabricating of large area solar cells (See col. 1 line 15 through col. 4 line 6 of Sariciftci). Therefore, it would have been obvious to one skilled in the art at the time the invention was made to modify the Scher's device by susbstituting fullerene as taught by Sariciftci for the nanocrystals for the motivation described above. Such modification would involve nothing more than use of known material for its intended use (e.g. electron acceptor) in a known environment (e.g. photoactive layer in the photovoltaic device) to accomplish entirely expected result (e.g. to form a photoactive layer that functions to convert light to electricity).

Furthermore, Appellant also describes that both nanocrystals (e.g. inorganic nanoparticles) and fullerene are equivalent electron acceptors that can combine with electron donor of polymers such as polythiophenes, polyphenylenes,

polyphenylvinylenes, P3HT (or poly 3-hexylthiophene) to form a photoactive layer in the photovoltaic device (See the specification of Appellant, page 3 lines 16-24, page 9 lines 13-24).

Ground 2: Claims 43-52 and 70-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (US Patent 6878871) in view of Sariciftci et al. (5331183), and further in view of Chapin et al. (US Patent 2780765).

Appellant argues that Chapin does not overcome the infirmities of the Examiner's proffered combination of Scher and Sariciftci that it would not have been obvious to one skilled in the art to modify Scher's photovoltaic cell according to Sariciftci. However, Appellant's argument is not deemed to be persuasive. The combination of Scher in view of Sariciftci is still deemed to be proper as explained above.

Ground 3: Claims 63 is rejected under 35 U.S.C. 103(a) as being unpatentable over Scher et al. (6878871) in view of Sariciftci et al. (5331183) and further in view of Griffin (US Patent 3442007).

Appellant argues that Griffin does not overcome the infirmities of the Examiner's proffered combination of Scher and Sariciftci that it would not have been obvious to one skilled in the art to modify Scher's photovoltaic cell according to Sariciftci. However, Appellant's argument is not deemed to be persuasive. The combination of Scher in view of Sariciftci is still deemed to be proper as explained above.

Furthermore, because Appellant did not argue the obviousness-type double patenting, the examiner requests the Board to summarily affirm.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Thanh-Truc Trinh/
Examiner, Art Unit 1795

Conferees:

/Basia Ridley/
Supervisory Patent Examiner, Art Unit 1795

Basia Ridley

/Anthony McFarlane/